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1 RECORD OF ORAL HEARING
2 UNITED STATES PATENT AND TRADEMARK OFFICE

3 _____
4 BEFORE THE BOARD OF PATENT APPEALS
5 AND INTERFERENCES

6 _____
7 EX PARTE ALGRIDAS AVIZIENIS

8 _____
9 Appeal 2009-003592
10 Application 09/886,959
11 Technology Center 2100

12 _____
13 Oral Hearing Held: October 6, 2009

14 _____
15 Before JAY P. LUCAS, ST. JOHN COURTENAY, III, and STEPHEN C.
16 SIU, *Administrative Patent Judges*.

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19 APPEARANCES:

20 ON BEHALF OF THE APPELLANT:

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1 The above-entitled matter came on for oral hearing on Tuesday,
2 October 6, 2009, at The U.S. Patent and Trademark Office, 600 Dulany
3 Street, Alexandria, Virginia, before Deborah Courville, Notary Public.

4
5 JUDGE LUCAS: Mr. Lippman, welcome to the Board of Patent
6 Appeals and Interferences. You will have 30 minutes to give your
7 presentation. I would like to point out, in the back we have Mr. Adam Lilly,
8 who is my patent attorney, and Mr. Patrick Baker, who is our paralegal, who
9 are observing the presentation, the oral hearing this morning. I'm going to --
10 well, by that clock you'll have exactly 30 minutes --

11 MR. LIPPMAN: Thirty-five is about right.

12 JUDGE LUCAS: Okay.

13 MR. LIPPMAN: Okay. Judge Siu, can you read this --

14 JUDGE SIU: Yes.

15 MR. LIPPMAN: That's amazing. Thank you.

16 I've been involved in patents since about 1964 and I have been to two
17 appeal hearings previously, both successful, and I feel that I know quite a lot
18 about the ins and outs of patents, although I'm not an appeals expert, of
19 course, but I've never before seen anything like this in a application record.
20 The Examiner warns me in this paper that the Board is not entitled to make a
21 final decision in my case; it's really up to the Examiner for purposes, he
22 says, of ensuring quality. Now, I don't know about you, but I find that a
23 little bit over the top, shall we say, a little on the offensive side.

1 So sometime this morning, if there's any time left in my 30 minutes, it
2 would be helpful for me to understand a little better whether what he's
3 saying is really true, if you feel like telling me.

4 JUDGE LUCAS: Whether -- is your question whether the Board can
5 allow claims? Certainly we cannot.

6 MR. LIPPMAN: No, the question is whether -- can instruct the
7 Examiner to allow claims or whether in fact the Examiner is the final
8 authority as Mr. Bonzo, the Examiner asserts here. I question --

9 I have only about a dozen images here, and so I have only about
10 dozen main points. So, obviously, I'm not going to be able to discuss all the
11 claims in detail. The reason we have so many claims is we were hoping by
12 claiming all the cross combinations of the different features of the invention
13 that we might convince the Examiner to allow a reasonable broad claim.
14 But he didn't.

15 So I want to talk about Claim 1, because many of the claims in this
16 case are depending on Claim 1. I think if we got Claim 1 and a few pending
17 claims with it, we'd be happy. We, by the way -- I don't have anybody in my
18 pocket -- means to include my client, Dr. Avizienis. Now, I just want to
19 point out that there is actually something in this short Claim 1 that
20 distinguishes the cited art. The cited art is a hardware, but it has software
21 that runs it. That's the patent to Mr. Best, B-e-s-t, which says that his
22 hardware system is to be operated by software, controlled by software. So
23 with that in mind, I feel, Dr. Avizienis feels that this distinguishes the Best
24 patent. Feel free if you have a question.

1 JUDGE COURTENAY: Well, your claim recites substantially no
2 software. That doesn't preclude a reading of the claim on something that has
3 software, because it doesn't say no software; it says substantially no
4 software.

5 MR. LIPPMAN: You're right, and I'll come to the issue of what
6 substantially means before too many panels here. As a matter of fact, many
7 of the issues in this case explicitly turn on definitions of several terms. I'll
8 try to deal with that. Thanks for your question. I'll make sure --

9 JUDGE COURTENAY: What does "substantially" mean to you?
10 There is some federal circuit case law on this subject.

11 MR. LIPPMAN: Well --

12 JUDGE COURTENAY: I believe the federal circuit has found
13 "substantially" means approximately in other cases.

14 MR. LIPPMAN: Um-hum. In this case, we used a somewhat
15 nonstandard meaning of substantially, but it's written down.

16 JUDGE COURTENAY: And what is that specifically, that
17 nonstandard meaning?

18 MR. LIPPMAN: I hope you didn't think I was going to try to get by
19 without telling you. No, I'm sorry, just a joke. We intend for it to mean that
20 if a competitor, let's say, sticks something in his device or in his method,
21 whichever -- which is trivial; it really not, not very important, but it takes the
22 apparatus or method out of the scope of the claims, then the word
23 substantially is especially meant for that person, if he tries to take the benefit
24 of the invention and escape by putting in something that doesn't matter.

25 JUDGE COURTENAY: Right. But we don't do infringement here.

1 We're the Patent Office. We're not a district court. We don't have --

2 MR. LIPPMAN: Right.

3 JUDGE COURTENAY: -- subject matter jurisdiction --

4 MR. LIPPMAN: Right.

5 JUDGE COURTENAY: -- over infringement matters.

6 MR. LIPPMAN: Right. Understood. But that's the intended meaning
7 of the word substantially. And I think it -- as the appeal documents indicate,
8 that meaning is pretty hard to evaluate in terms of prior art. It's intended to
9 be evaluated in terms of things that the, quote, "infringer," unquote, is doing,
10 and, of course, that's not a standard thing to do. On the other hand, you'll
11 remember there was a case of Festo, which stringently contracted the
12 doctrine of equivalency and held -- holds applicants to their literal meaning
13 of particular elements if those elements are amended. So we don't have any
14 trouble being held to the literal meaning of our claim, provided that we can
15 insert something that covers the people who want to cheat. So it's only for
16 those people and it's explained in the Reply Brief and probably the Appeal
17 Brief.

18 JUDGE COURTENAY: Well, again, we're not concerned with
19 infringement matters here. We're not concerned with the doctrine of
20 equivalents. We do the broadest reasonable construction of your claimed
21 invention in a manner consistent with your specification. So what
22 specifically is your interpretation of the word substantially and can you point
23 us to where in your specification that interpretation is supported? That's
24 what we're concerned with here today.

25 MR. LIPPMAN: The specification would support the meaning that

1 I've described to you and so will the Appeal Brief.

2 JUDGE COURTENAY: And what is that meaning again?

3 MR. LIPPMAN: It's not anything like approximately, although it
4 would be awfully close to approximately. But it's talking about situations in
5 which an infringer deliberately, intentionally inserts something that's only
6 there for one purpose, and that is to avoid the claim, not for any other
7 purpose. It is in -- it is covered in the Briefs, and if you like, I can let you
8 know where it is.

9 JUDGE COURTENAY: Well, you are permitted to be your own
10 lexicographer, but we would like to see some place in your specification you
11 can point to that points out some meaning that departs from the ordinary and
12 customary meaning of the term "substantially."

13 MR. LIPPMAN: Oh. I believe it's in the spec as I've stated it. But if
14 it's not, I'll --

15 JUDGE COURTENAY: We don't make decisions based upon
16 beliefs. We need to see facts and evidence.

17 MR. LIPPMAN: Understood. Yes, right. Well, I can't answer that
18 question right now because I might run over my 30 minutes.

19 JUDGE COURTENAY: Okay.

20 MR. LIPPMAN: But it's obviously a very, very critical question.

21 JUDGE LUCAS: Looking at the claim in a more holistic manner, it
22 appears that the main point is that the program is held in unalterable read-
23 only memory, except for a small, whatever, substantially no software --
24 except for a small amount that may be read to be held in regular random
25 access memory. How do you distinguish over the Best reference?

1 MR. LIPPMAN: I think the bracketed, the boxed language
2 distinguishes the Best reference, because he has software. I'd be happy --

3 JUDGE LUCAS: Well, you have software, too. Excuse me for
4 interrupting, but you have software, too, according to your claim. It's just
5 that the software is held in read-only memory.

6 MR. LIPPMAN: The -- yes, in unalterable read-only memory. So the
7 basic idea is this claim is about a hardware device. The read-only memory is
8 a hardware device.

9 JUDGE COURTENAY: Right.

10 MR. LIPPMAN: I was going to suggest that what may be helpful is
11 when you see the word substantial, blot it out. If it meant nothing, it would
12 be probably okay for present purposes. I think no software and no
13 firmware -- programs --

14 JUDGE COURTENAY: Well, read-only memory is not just a
15 hardware device. It generally contains software. It's programmed.

16 MR. LIPPMAN: Usually --

17 JUDGE COURTENAY: It's a one-time programmable memory that
18 contains software.

19 MR. LIPPMAN: Right. Usually it's called --

20 JUDGE COURTENAY: And that's essentially what firmware is.

21 MR. LIPPMAN: It usually -- pardon me?

22 JUDGE COURTENAY: That's essentially what firmware is.

23 MR. LIPPMAN: Yes, exactly. I was about to say that's usually
24 what's called firmware. So that's why the word firmware is there.

25 JUDGE LUCAS: Now, are you saying that Best does not contain its

1 programs in read-only memory, does not contain some programming in
2 read-only memory?

3 MR. LIPPMAN: To my understanding, Best has primarily, if not
4 exclusively, has hardware that is controlled by some nearby computer that
5 has software.

6 JUDGE LUCAS: Okay. Please continue with your presentation.

7 MR. LIPPMAN: I'll try. As I mentioned a minute ago, there are a lot
8 of definitional issues here and we've been talking about one. And I think the
9 others are -- excuse me, the others are discussed by a declaration that we
10 submitted in the name of a guy named Laprie, who is an expert in computer
11 science and says that he knows nothing about patents, especially U.S.
12 patents. He's a Frenchman. And this quotation here is from the Examiner's
13 Answer, pages 58 to 59. It says, "Applicant routinely defers to the affidavit
14 declaration," actually, of Laprie. "Under current MPEP guidance this not
15 permissible." I believe that's an incorrect statement, as indicated down here.
16 MPEP specifically states, the Examiner goes on, "while it must be reviewed
17 and considered for what it contains, the legal finds themselves" -- I believe
18 he means findings -- "are not to be considered." And we agree with that.
19 The only part of Laprie's declaration that should be considered is material
20 that is not a legal finding. And Laprie's declaration says I don't know much
21 about patents and all I know about is computer science, which is because I'm
22 a computer scientist. And he says there are some things that make sense and
23 some that don't.

24 So here it says the affidavit was reviewed and taken under
25 consideration as required by the MPEP, and he cites to 716.01(c)(3). And

1 I'm trying to point below that MPEP 716.01(b) says that if the Applicant's
2 evidence is considered by the Examiner to be insufficient, then a general
3 statement -- such as a declaration lacks technical validity or the evidence is
4 not commensurate with the scope of the claims -- without an explanation, a
5 specific explanation, is not sufficient. That's what the MPEP really says
6 about this issue raised by the Examiner. There's no preclusion of declaration
7 or affidavit type evidence.

8 But concerning the bottom part of this display, the Examiner says that
9 affidavit was reviewed and taken under consideration as required, which is
10 not even as definite as "the declaration lacks technical validity." It's not
11 even as definite as "not commensurate with the scope of the claims." He just
12 says it was reviewed and taken under consideration, which I believe is
13 insufficient to satisfy the MPEP 716.01(b) requirement.

14 JUDGE LUCAS: We understand your position.

15 MR. LIPPMAN: Thank you. Not to belabor this point, but this is on
16 the same point. This is the Advisory Action before the filing of an Appeal
17 Brief. And this is the standard form. It says, arguments are unpersuasive.
18 Again, that's not very specific in view of 716.01(b).

19 JUDGE LUCAS: Right.

20 MR. LIPPMAN: And down at the bottom in little bitty type, which
21 is -- I apologize for, but it's actually Mr. Bonzo's little bitty type.
22 Continuation of paragraph 13, "The affidavit of 6/9/06 has been considered
23 but is found unpersuasive." To me, that's a way of saying -- I don't care
24 what it says. I'm not going to bother to talk about what it says.

25 Now, one of the big issues in this case deals with a phrase,

1 "substantially exclusively," that phrase right there, which is in the claim and
2 from the beginning was in the claim.

3 JUDGE COURTENAY: So this is regarding the 112 second rejection
4 the Examiner --

5 MR. LIPPMAN: Yes. Yes, it is.

6 This occurrence of the word "substantially" is not in the case. This
7 one is, "substantially exclusively." The words "substantially exclusively"
8 are in the case but not the words "substantially COTS," commercial off-the-
9 shelf components, anymore. It was taken out because the Examiner made
10 the point that "substantially COTS" is softening an already very soft
11 concept, COTS, commercial off-the-shelf.

12 JUDGE LUCAS: That's a common phrase.

13 MR. LIPPMAN: It's common, but not well defined.

14 JUDGE LUCAS: Exactly. It's common in contracting law and it's --
15 especially government contracting.

16 MR. LIPPMAN: Right.

17 JUDGE LUCAS: But it's got a sufficient ambiguity, a significant
18 ambiguity. It's substantially ambiguous --

19 MR. LIPPMAN: I like that.

20 JUDGE LUCAS: -- when used in a claim. Because a claim is going
21 to be interpreted over 20 years perhaps and --

22 MR. LIPPMAN: Exactly.

23 JUDGE LUCAS: -- what is available off the shelf at one time is not
24 available, perhaps, later.

25 MR. LIPPMAN: Right.

1 JUDGE LUCAS: So seeing it in your claims was a very --

2 MR. LIPPMAN: Unnerving. I apologize.

3 JUDGE LUCAS: Okay.

4 MR. LIPPMAN: I didn't, I didn't mean --

5 JUDGE LUCAS: I'll accept your word for it.

6 MR. LIPPMAN: Yes. Well, I didn't know that it would be that
7 troublesome, and I think if it would be helpful, we could talk about ways to
8 mitigate that. I haven't thought about the idea of taking the word or the
9 acronym COTS or this phrase "commercial off-the-shelf" out completely.
10 Obviously, when we took out "substantially," we unsoftened it somewhat.
11 But you're suggesting that COTS even by itself is too nebulous?

12 JUDGE LUCAS: Troublesome.

13 MR. LIPPMAN: Yeah. So, I'm sorry, were you going to go on?

14 JUDGE LUCAS: I was. But the "substantially" was used, for
15 example, in Claim 1 with respect to the amount of -- the existence of RAM,
16 random access memory, as opposed to read-only memory. In the Best
17 reference, the Examiner pointed to a point in the reference where the
18 program was stored in read-only memory, which is exactly what is claimed.
19 It is true that --

20 MR. LIPPMAN: Understand.

21 JUDGE LUCAS: -- in the Best reference there was also random
22 access memory. And you're trying to distinguish over the Best reference, the
23 anticipation over the Best reference, by saying that -- you're claiming,
24 negative limitation, that you do not have anything more than a, what, a
25 minimal amount, a -- substantially no software and no firmware, except what

1 is held in read-only memory. So "substantially" is now transcending just a
2 112 second. It's actually entering into the consideration of the 102 over
3 Best. How do you distinguish, again, over Best based on substantially no
4 programming, when both the reference and your claim store the program in
5 read-only memory?

6 MR. LIPPMAN: It's not my recollection that Mr. Best describes a
7 program in read-only memory, but I would like opportunity to think about
8 that and perhaps respond if it turns out it's a --

9 JUDGE LUCAS: Yes, you might want to contemplate where the
10 Examiner mentioned it in column 6, that a read-only memory device that
11 provides high-speed minimal hardware contrast -- basically, the program is
12 stored. Okay. It's a point to consider.

13 MR. LIPPMAN: All right. I definitely will, column 6, especially.

14 JUDGE LUCAS: Right.

15 MR. LIPPMAN: I might mention that I've not been aware that
16 Examiner Bonzo specifically addressed that question of read-only memory
17 being in Best or affirmative. But I'm going to review that --

18 Okay. Now the question of what's in the claims is discussed a lot in
19 prosecution of this case and I have stated the reasoning that the word "for" in
20 the preamble is not a recitation of a computing system as a claim element.
21 That's stated in case law which is cited in particular to this case. If my mind
22 were with me this morning, I'd tell you the name of that reference, but I --
23 case, but it's --

24 JUDGE LUCAS: We accept that.

25 MR. LIPPMAN: Thank you.

1 Now this has to do with the special nomenclature that's used in this
2 application. The word "such" is used as a kind of definite article in place of
3 "the." When in the body of the claim, lines 3 through 9, not in the preamble,
4 and when we're presenting the elements of the invention that were --
5 hardware, but we're referring back to something that's in the preamble,
6 namely, the computing system. Computing system in this case is, in Claim
7 1, is not an element of the invention. It's an element of the environment or
8 context of the invention.

9 JUDGE LUCAS: Are you reading "such" as said, the more
10 conventional word "said"?

11 MR. LIPPMAN: I'm reading "such" as defined in the application in
12 the way that I've described. It's specifically laid out in the application how
13 this is used. It's used in the claim when setting out the elements of the
14 invention, but referring back to an element of the environment of the
15 invention, the operating environment or context of the invention.

16 Now the reason for this is a lot of patent lawyers like to keep things as
17 ambiguous as possible and they don't like to be pinned down as to whether
18 something like the computing system is an element of the invention or not,
19 just an element of the environment that we mentioned. I don't feel that way.
20 I think that's inappropriate. And that's why I've introduced this language
21 "such" instead of "the" or "said" to clearly delineate that the thing we're
22 talking about right here, and right here in lines 6 and 9, and also in line 2 in
23 the preamble, all those things are to be considered not elements of the
24 claimed invention, only elements of the environment. Now, when we get to
25 Claim 4, we explicitly add another element of the invention, namely --

1 JUDGE LUCAS: I'm sorry.

2 MR. LIPPMAN: Sure.

3 JUDGE LUCAS: I understand that in the preamble you may have a
4 term of intended use which is nonlimiting. But when you have a listing in
5 the actual body of the claim for various limitations, do you not believe that
6 saying that the connection to said system, such system, brings it into an
7 element of the claim?

8 MR. LIPPMAN: It's certainly not intended to bring it and there's an
9 explicit disclaimer that it -- of its status as an element of the invention. The
10 idea is explicitly to discriminate between things that are elements of the
11 invention and things that are not.

12 JUDGE LUCAS: May I ask you then --

13 MR. LIPPMAN: Yes.

14 JUDGE LUCAS: -- am I correct in reading that second limitation as
15 terminals of a network --

16 MR. LIPPMAN: Or connection.

17 JUDGE LUCAS: -- that may or may not be connected to the system?

18 MR. LIPPMAN: No. The connection is part of the claimed
19 invention, but it's a --

20 JUDGE LUCAS: Connection to --

21 MR. LIPPMAN: It's a connection to an element of the context or
22 environment of the invention, not a connection to something that's part of
23 the invention.

24 JUDGE LUCAS: So it's a terminal that connects to anything?

25 MR. LIPPMAN: It's a terminal that connects to something that has a

1 character, character of the computing system mentioned in the preamble.

2 JUDGE COURTENAY: Well, as you say in your claim, the terminals
3 are not positively recited as being connected to anything. It just says
4 terminals of the network for connection. They could be connected to
5 something.

6 MR. LIPPMAN: That's true.

7 JUDGE COURTENAY: But they're not positively recited as actually
8 being connected to anything.

9 MR. LIPPMAN: That's true. However, I'd be happy to take that word
10 for out of line 6, if anybody would think that would make a difference --

11 JUDGE COURTENAY: Right. But you're before the Board now and
12 the time for amendment is past, unless the prosecution is reopened.

13 MR. LIPPMAN: I understand. However, it's my understanding that
14 the Board is in a position to make recommendations for amendment that
15 would make a difference, and we would invite your recommendation for any
16 such amendment, particularly, one that deals with items -- line 6, the word
17 for.

18 JUDGE COURTENAY: When you use the word such system, it
19 appears to me it's not limited to a computing system. It could be any system,
20 not just any computing system. It seems like there's --

21 MR. LIPPMAN: Well, actually --

22 JUDGE COURTENAY: -- almost no antecedent basis because it
23 broadens the term system.

24 MR. LIPPMAN: Our intention is that it refers to specifically to the
25 computing system whose failure is deterred by the apparatus.

1 JUDGE COURTENAY: So why not just use "said" or "the" instead
2 of "such"?

3 MR. LIPPMAN: Because that makes -- because that would not be as
4 strong in distinguishing against elements of the environment. Now maybe it
5 would help -- I saw your mouth open. Would you like to --

6 JUDGE LUCAS: No.

7 MR. LIPPMAN: Okay. Maybe it would help a little bit if I point out
8 that Claim 4 is different. Claim 4 says that -- Claim 1 plus the computing
9 system. So now in Claim 4, the computing system is an element of the
10 invention. In Claim 1, it's only an element of the context or environment.

11 JUDGE LUCAS: I'm saying if they want to come take a look, they
12 can take a look.

13 MR. LIPPMAN: Oh, by all means. I'm sorry, I pointed these away
14 from you.

15 So my point is here that the word "such" is used in a special way,
16 which is advertised in the specification explicitly -- bring a chair over here,
17 feel free. And so there's a difference. Claim 4 further limits Claim 1. That's
18 one of the things that Mr. Bonzo became very exercised about. Claim 1 says
19 the computing system is not an element of this claimed invention. Claim 4
20 says, ah, but now I've got a new claim. In this claim, it is an element of the
21 claimed invention. Okay?

22 JUDGE LUCAS: Okay.

23 JUDGE COURTENAY: The phrase "such system" is in the body of
24 Claim 1. I can see the Examiner's position. He's saying it's not further
25 limiting and you're saying exactly the opposite.

1 MR. LIPPMAN: That's right, I am. It's further limiting in Claim 4,
2 not in Claim 1. I'm sorry. Claim 4 further limits Claim 1, because Claim 4
3 has an element in it as an element of the invention that's not in Claim 1,
4 namely, the computer system.

5 JUDGE LUCAS: I think I now, whether I agree or not, I do
6 understand your point of view.

7 MR. LIPPMAN: Thank you very much.

8 JUDGE LUCAS: I['m also going to say that it's time to start wrapping
9 up.

10 MR. LIPPMAN: Okay.

11 JUDGE LUCAS: So if you'll just take a minute or two to summarize?

12 MR. LIPPMAN: Yeah. On the question of whether software --

13 JUDGE LUCAS: Oh, I never turned it on.

14 JUDGE COURTENAY: I see.

15 JUDGE LUCAS: Please.

16 MR. LIPPMAN: Go ahead if you want, have a side bar. I'll quiet.

17 JUDGE LUCAS: Side bar, we never turned on the clock. We were --

18 MR. LIPPMAN: Yeah. Okay.

19 JUDGE LUCAS: But that needn't be --

20 MR. LIPPMAN: There was an issue in the case whether software
21 engineering and hardware engineering are in the head of any one person of
22 ordinary skill in the art. Dr. Avizienis says no. I said, well, I can tell the
23 Board you say no, because that's helpful to your position with respect to this
24 case, but do we have any objective evidence? He came up with what he
25 considered to be objective evidence. U.S. Department of Labor has 17

1 engineering specialties, including computer hardware engineers. Computer
2 software engineers, sometimes called computer engineers, are a different
3 group, according to the U.S. Department of Labor. That's just one source.
4 Okay?

5 JUDGE LUCAS: Okay. I don't understand how this ties into the
6 allowability of the claims.

7 MR. LIPPMAN: The claim that we would be talking about now
8 would be an obviousness rejection based on the Best patent for hardware and
9 the Avizienis publication, 1985, or thereabouts, for soft. And the Examiner
10 says, well, he's just going to combine those two, and Dr. Avizienis says, no,
11 no, no, no, nobody would do that in the computer world because those
12 people don't talk to each other hardly ever. They have different
13 classifications by the U.S. Department of Labor. Hardware engineering is
14 considered in the 17 engineering specialties and software engineering
15 otherwise. This is an excerpt from a computer society, IEEE computer
16 society study and project which was trying to set up curricula for computer
17 studies. And a task force made the decision to provide curriculum guidance,
18 one for each area of computing. And you'll notice there is a separate
19 software engineering curriculum. This means that when people go to school,
20 they can decide whether they want to be software engineers or hardware
21 engineers or if they want to be a person of extraordinary, not ordinary skill
22 in the art, which maybe they study both. That would be a little out of the
23 ordinary.

24 Normally, we assume that if it's a patent, everybody's entitled to
25 constructive notice. If it's a technical paper, we usually say people have

1 constructive notice, but -- and if you're not, I think if you can prove in some
2 objective fashion that it's not true that people will see both and be able to
3 combine --

4 JUDGE COURTENAY: Can you point to where in the record these
5 documents are in evidence?

6 MR. LIPPMAN: It's not -- what's in the record, is just -- I was trying
7 to knock my water down by now -- what's in the record is just a statement
8 that they're separate. These particular --

9 JUDGE COURTENAY: But these documents are not in the record
10 before us?

11 MR. LIPPMAN: That is correct.

12 JUDGE COURTENAY: So you're introducing new evidence here at
13 the hearing?

14 MR. LIPPMAN: Yes.

15 JUDGE COURTENAY: And it's not in the Appendix to your Appeal
16 Brief as listed as evidence, extrinsic evidence?

17 MR. LIPPMAN: That is right.

18 JUDGE SIU: Contrary to rules.

19 JUDGE COURTENAY: Yes, that's -- it's contrary to our rules.

20 JUDGE LUCAS: But could you just -- we only have about 15, 30
21 seconds. Can you summarize your point --

22 MR. LIPPMAN: This is in the record --

23 COURT REPORTER: Excuse me, sir. Sir, can you not talk while
24 you're ruffling papers?

25 MR. LIPPMAN: I hear you. Yes.

1 COURT REPORTER: Thank you.

2 MR. LIPPMAN: It's hard for me to not talk, but I'll try.

3 This is in the record by incorporation by reference. This is the
4 particular issue of the IEEE, sorry, the IEE -- got covered up by a barcode --
5 issue that has Dr. Avizienis's paper in it that's gotten Examiner so excited.
6 This software engineering journal is not read by hardware people.

7 JUDGE LUCAS: I think we understand your point now. And I'm
8 going to say that your time is up at this point.

9 MR. LIPPMAN: You'd like me to stop?

10 JUDGE LUCAS: And we'd like you to stop. Yes, your time is up at
11 this point. I thank you very much, Mr. Lippman, for coming in.

12 (Whereupon, the proceedings were concluded on Tuesday, October 6,
13 2009.)